

STATE OF ARIZONA
OFFICE OF ADMINISTRATIVE HEARINGS

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2
3 [REDACTED], a Student, by and through Parents [REDACTED]
4 [REDACTED] and [REDACTED],

No. 08C-DP-08024-ADE

5 Petitioners,

6 -v-

7 Peoria Unified School District No. 11,

8 Respondent.
9

ADMINISTRATIVE
LAW JUDGE
DECISION

10
11 **HEARING:** February 11-13, 2008

12
13 **APPEARANCES:** Petitioners, Parents [REDACTED] and [REDACTED], appeared on behalf of
14 themselves and Student [REDACTED], and were represented by attorney **David L. Abney**, LAW
15 OFFICES OF CHARLES M. BREWER, LTD.; attorney **Lindsay E. Jones**, GUST ROSENFELD,
16 PLC, appeared on behalf of the **Peoria Unified School District (PUSD)**, accompanied
17 by **Steve Savoy**, Administrator for K-12 Academic Services, PUSD.

18 **WITNESSES:**¹ For Petitioners: [REDACTED], Stepmother; [REDACTED],
19 Father (together referred to as "Parents"); **Scott Blackwell, Ph.D.** (by telephone), as a
20 treating psychologist; **Gabrielle Lawrence, Ph.D.**, as a psychologist evaluator;
21 **Kenneth J. Zwier, M.D.**, as a former treating psychiatrist; **Faith Thaw**, Special
22 Education Consultant/Advocate ("Advocate"); **Joseph J. McGuill** (by telephone), Chief
23 Executive Officer of Villa Santa Maria (a residential treatment center); **Judith Pentz,**
24 **M.D.** (by telephone), as a treating psychiatrist; **Jessica Berensen, MSW, LISW**, (by
25 telephone) as a treating therapist; **Breeann Wilkinson** (by telephone), as Milieu
26 Director, Villa Santa Maria; **Christine Rico** (by telephone), Special Education Teacher,
27 Villa Santa Maria ("RTC Special Education Teacher").

28 For Respondent School District: **Michael Linehan**, School
29 Psychologist/Evaluator, PUSD; **Susan Barry**, Special Education Teacher, PUSD
30 ("Public School Special Education Teacher"); **Mary Arden**, District Representative for
the PUSD Self-Contained Classroom Program for Emotionally Disabled Children; **Gay
Hardy**, School Psychologist/Director, Austin Center for Exceptional Students (ACES);
Tyra Holman, Special Education Teacher, PUSD ("Private Day School Special

¹ To avoid the use of proper names, in order to protect confidentiality, Student, Parents, and teachers have been given a generally descriptive title to be used in the body of the Decision. Their proper names are grouped here for ease of redaction.

Education Teacher"); **Dawn Ratke**, Special Education Director, PUSD; and **Steve Savoy**, Administrator for K-12 Academic Services, PUSD.

ADMINISTRATIVE LAW JUDGE: Eric A. Bryant

Parents bring this due process action on behalf of Student, who is a child with a disability, against Respondent School District seeking reimbursement for expenses incurred for a parental placement of Student in a residential treatment facility and seeking a declaration that Student remain in the residential facility at public expense. The law governing these proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code (U.S.C.) §§ 1400-1482 (as re-authorized and amended in 2004²), and its implementing regulations, 34 Code of Federal Regulations (C.F.R.) Part 300,³ as well as the Arizona Special Education statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-406.⁴

Petitioners filed their due process complaint on December 18, 2007. Notice of Hearing issued on December 19, 2007, setting the hearing for February 11 and 12, 2008. On February 1, 2008, this tribunal conducted a lengthy pre-hearing conference over several hours. At that conference the issues were identified as:

1) Whether Parents are entitled to reimbursement for all or part of the expense of educating Student at a private residential treatment facility after they removed Student from her public school placement and individualized educational program (IEP)? (This involves whether or not Respondent School District offered a free appropriate public education (FAPE) to Student, whether Parents' placement is appropriate, whether Parents gave proper notice of the removal to Respondent School District, and possibly other equitable factors.)

and

² By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004," IDEA 2004 became effective on July 1, 2005.

³ The current federal regulations became effective October 13, 2006.

⁴ It is noted that these rules are being revised to comport with the 2005 changes in federal and Arizona special education law, but have not yet been published by the Arizona Secretary of State.

2) Whether placement at the residential treatment center is the only appropriate placement for Student to receive FAPE at this time?⁵

Petitioners request that Respondent School District be ordered to “pay for [Student]’s past and ongoing placement at [the residential treatment center]—and for all related services—until a proper IEP team meeting concludes that she can and should reasonably be placed elsewhere.” Petitioners also request an order stating that the residential treatment center is “an appropriate placement for [Student]” and that the residential treatment center is the least restrictive environment in which Student can receive a FAPE.⁶

The parties presented testimony and exhibits at the hearing on February 11, 12, and 13, 2008. Petitioners presented testimony from the witnesses noted above and offered into evidence Exhibits 1 through 77, all of which were admitted into the record.⁷ Respondent School District presented testimony from the witnesses noted above and offered Exhibits numbered 100 through 133, which were also admitted.⁸

After the hearing, the parties submitted written closing arguments—Petitioners’ opened on March 4, 2008, Respondent School District responded on March 24, 2008, and Petitioners replied on April 4, 2008. The Administrative Law Judge has considered the entire record, including the testimony and exhibits,⁹ and now makes the following Findings of Fact, Decision, and Order finding that Respondent School District did not offer Student a free appropriate public education, that the private residential treatment center was an appropriate placement, but that Parents did not give adequate notice of

⁵ A third issue between the parties, whether Student should be classified as a student with an “emotional disability” or a student with an “other health impairment,” was resolved before the hearing began. Respondent School District changed Student’s eligibility category from “other health impairment” to “emotionally disabled.”

⁶ Petitioners also request an award of attorney’s fees and costs, but provide no legal support for the claim that would show that this tribunal has authority to make such an award. This tribunal knows of no such authority. Therefore, the request is *summarily denied* and will not be addressed further.

⁷ These Exhibits are indexed in PETITIONERS’ LIST OF HEARING EXHIBITS filed February 1, 2008.

⁸ PEORIA UNIFIED SCHOOL DISTRICT’S LIST OF WITNESSES AND EXHIBITS was also filed February 1, 2008. Exhibits 78 to 99 do not exist.

⁹ The Administrative Law Judge has reviewed each admitted Exhibit, even if not mentioned in this Decision. In the case of voluminous school records and logs (for example Exhibits 76 and 104), this means that the exhibit was skimmed unless pages of the exhibit were specifically referred to in testimony. The Administrative Law Judge has also considered the testimony of every witness, even if not mentioned in this Decision.

1 their intent to remove Student from Respondent School District at public expense.
2 Therefore, Parents are not entitled to full reimbursement and must bear a portion of the
3 cost of tuition for the private placement. Further, any determinations of what constitutes
4 a FAPE for Student in the future will be determined by an IEP team upon conclusion of
5 the residential treatment, as provided below.

6 **FINDINGS OF FACT**

7 The facts of this case center on events occurring just before Parents removed
8 Student from Respondent School District and placed her in a residential treatment
9 center in late January 2007, which will be the focal point of these findings.

10 1. In January 2007, Student E. H. was a ten-year-old fourth grader at Pioneer
11 Elementary School in the Respondent School District. Student struggled with mental
12 health issues that caused her to have behavioral problems that adversely affected her
13 education. At that time, Student was in a self-contained classroom for children with
14 emotional disabilities. How she got there is important background information for this
15 dispute.

16 2. Student has a long and complicated history of behavioral and emotional
17 disturbances.¹⁰ At age four, she was diagnosed with bipolar disorder,¹¹ a controversial
18 and unusual diagnosis in children.¹² She has also received diagnoses of Attention
19 Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD).¹³ One
20 of her chief problems is emotional regulation—the ability to regulate one's emotions
21 during daily activities and interaction with others.¹⁴ Another major problem for Student
22 is her severe impulsivity. She cannot control impulses very well.¹⁵ Most recently,
23 beginning in 2006, she has received a diagnosis of Reactive Attachment Disorder
24 (RAD), a condition stemming from childhood neglect that affects her ability to bond and
25

26 ¹⁰ Exhibit 6 [6/06 Pediatric Neuropsychological Evaluation by Paul Beljan, Psy.D.]; Testimony of Gabrielle
27 Lawrence, Ph.D., Reporter's Transcript of Proceedings (hereinafter "R. T.") (Vol. I) at 73 (Student "has a
28 very complicated diagnosis").

¹¹ *Id.*

¹² Testimony of Scott Blackwell, Ph.D.; R. T. (Vol. I) at 34.

¹³ Exhibit 46 [11/07 Psycho-Educational Evaluation by Mike Linehan, School Psychologist].

¹⁴ Testimony of Dr. Blackwell, R. T. (Vol. I) at 68 (children like Student "have great difficulties regulating
30 their emotions when they experience shame or they get upset").

¹⁵ Testimony of Dr. Lawrence, R. T. (Vol. I) at 81-82.

1 attach with others as well as feel safe and secure with them.¹⁶ The weight of the
2 evidence shows that she suffers from both bipolar disorder and RAD.¹⁷ Due to these
3 disorders, she is very difficult to treat.¹⁸

4 3. Student has resided in Respondent School District since she began
5 kindergarten.¹⁹ She had been identified as a child with a disability and was receiving
6 special education and services since beginning school in kindergarten.²⁰ She was
7 identified as a child who met the eligibility category of "Other Health Impaired" based on
8 her diagnoses of bipolar and ADHD and her need for special education and services.²¹
9 Recently, Respondent School District has changed Student's eligibility category, at the
10 request of Parents, to "Emotionally Disabled" (ED) after an extensive evaluation in late
11 2007.²²

12 4. In third grade, 2005-2006, Student was in a regular education class with
13 modifications, a behavior plan, and resource room as needed for emotional and
14 behavioral issues.²³ Academically, Student did well.²⁴ But, she was hospitalized for
15 about two weeks in February 2006 for out-of-control behaviors at home.²⁵ And, her
16 behaviors at school were causing problems for her and other students. She was very
17 aggressive toward other children, such that she did not go to recess or participate in
18 group-reading time in the classroom.²⁶ In response, a behavior management plan was
19 written and implemented.²⁷ By the start of the next school year, however, Student's IEP
20 team agreed that she needed a more structured environment that could better serve
21 her behavioral needs. Thus, she was placed in a self-contained classroom for ED

22 ¹⁶ Exhibit 7 [10/06 Psychological Evaluation by Dr. Blackwell].

23 ¹⁷ Testimony of Dr. Blackwell, R. T. (Vol. I) at 63-64; Testimony of Judith Pentz, M.D., R. T. (Vol. I) at 265.

24 ¹⁸ Testimony of Kenneth Zwier, M.D., R. T. (Vol. I) at 137; Testimony of Dr. Pentz, R. T. (Vol. I) at 267.

25 ¹⁹ Testimony of Stepmother, R. T. (Vol. I) at 111.

26 ²⁰ Exhibit 46 at 4.

27 ²¹ Exhibit 15 [2/05 Evaluation by Susan Hedges, School Psychologist].

28 ²² The record shows that the ED category better describes Student's condition, but there is no evidence
29 showing that Student failed to get education or services that she was otherwise entitled to because of her
30 OHI category of eligibility. Respondent School District served Student as she presented, not as she was
categorized for eligibility purposes.

²³ Exhibit 15.

²⁴ *Id.*; Exhibit 16 [2/06 IEP Needs and Present Levels of Performance] (Student "is very bright and capable
of working at grade level in her academics").

²⁵ Exhibit 46 at 2.

²⁶ Exhibit 17 [5/06 IEP Alternate].

²⁷ *Id.*

1 children at Pioneer early in the 2006-2007 school year, her fourth grade.²⁸ This was
2 done in response to behaviors such as "interrupting the learning of others, physical
3 aggression, noncompliance, and atypical responses to normal situations."²⁹ Student
4 was given school-based "counseling and crisis intervention" services and Parents were
5 informed that the staff in the ED classroom was trained in "nonviolent crisis prevention
6 strategies and will restrain students only as a last resort to prevent them from harming
7 themselves or others."³⁰ Parents were also informed that "the Pioneer program will
8 utilize the ACES Private Day School's Focused Behavior Intervention Program (FBI) as
9 an alternative to suspending students at home, in the event that they require temporary
10 removal from the school campus."³¹ Clearly, Student's behavioral problems were
11 becoming more severe.

12 5. In late May and early June 2006, Student was evaluated by pediatric
13 neuropsychologist Paul Beljan, Psy.D.³² He authored a report that noted aggressive
14 behaviors, tantrums, refusal to work, and trouble resisting impulses as problems for
15 Student.³³ He found Student to be within the average range of intelligence and that she
16 did not have a learning disability.³⁴ He noted that some of her scores for the testing he
17 administered were affected by her inattentiveness and impulsivity.³⁵ He found these
18 two traits to "cause her to have difficulty incorporating environmental feedback into her
19 behavioral decisions."³⁶ He confirmed diagnoses of ADHD, RAD, and bipolar
20 disorder.³⁷ He also made specific recommendations for educating Student, including
21 continued psychiatric care, counseling and therapy, close monitoring of her emotional
22 functioning, and a classroom that is quiet with minimal distractions.³⁸ His report does
23 not recommend residential treatment; it does not address level of educational
24 placement.

25 ²⁸ Exhibit 19 [8/06 IEP Alternate].

26 ²⁹ *Id.*

27 ³⁰ *Id.*

28 ³¹ *Id.*

29 ³² Exhibit 6.

30 ³³ *Id.* at 1-2 (pages are not numbered by author).

³⁴ *Id.* at 7 and 9.

³⁵ *Id.* at 7-9.

³⁶ *Id.* at 8.

³⁷ *Id.* at 9.

³⁸ *Id.* at 9-15.

1 6. In June 2006, psychologist Gabrielle Lawrence, Ph.D., recommended that
2 Parents look into an inpatient residential treatment center in New Mexico, called Villa
3 Santa Maria, that specializes in treating children with RAD.³⁹ Student's treating
4 psychiatrist, Kenneth Zwier, M.D., recorded in June 2006 that Parents expressed some
5 trepidation about sending Student to New Mexico.⁴⁰ In August 2006, Dr. Zwier noted
6 that while RAD seemed to be "fitting more" as a diagnosis, his understanding of the
7 preferred treatment method for it was "individual therapy, parent counseling, and
8 combined counseling" rather than residential treatment.⁴¹ At that time, August 2006, he
9 made no recommendation for residential treatment. At this same time, Student was
10 moved to the self-contained ED program at Pioneer.

11 7. During the fall of 2006, Student's behaviors continued to be a serious
12 problem. Her self-contained classroom, as described by her Public School Special
13 Education Teacher, had nine to eleven students with one teacher and one assistant.⁴²
14 The children in the class received counseling, art and music therapy, and a program
15 specifically designed to teach them about regulating their energy levels.⁴³ Student's
16 IEP goals were to (1) demonstrate ways to manage stress, (2) respectfully and
17 considerately communicate with others, (3) show positive interactions with peers and
18 cooperatively work with teams, (4) "seek attention with appropriate actions while the
19 class is required to listen," and (5) to "maintain self-control when faced with information
20 that she does not understand."⁴⁴ While working on these goals for the months up to the
21 December holiday break, Student was successful some days, but also had times of
22 struggle. She was sent to timeout numerous times, was put in therapeutic holds
23 several times, and spent more than ten days in in-school-suspension (ISS).⁴⁵ On one
24 day in October, Student repeatedly banged her forehead on the desk when she found
25 out she was going to ISS the next day for being overly aggressive ("hurling a ball" at
26

27 ³⁹ Exhibit 56 [6/28/2006 Progress Note, Dr. Zwier].

28 ⁴⁰ *Id.*

29 ⁴¹ *Id.* [10/26/2006 Progress Note, Dr. Zwier].

30 ⁴² Testimony of Public School Special Education Teacher, R. T. (Vol. II) at 525.

⁴³ *Id.* at 525-26.

⁴⁴ Exhibits 16 and 17.

⁴⁵ Exhibits 108H, 108I, 108J, and 76.

another student), which resulted in a therapeutic hold.⁴⁶ She did well enough in ISS the next day to go back to class the following day,⁴⁷ but then she became so upset because she had to miss recess that she became defiant, curled up in a ball on the floor "screaming," and again banged her head on the desk after staff got her off the floor.⁴⁸ Another hold was given to keep her safe.⁴⁹ Finally, in December, records show that Student was banging her head against the window on the bus she rode to get home, causing such disruption that she was taken back to school so that the teachers could handle it.⁵⁰

8. Although Public School Special Education Teacher admitted that Student was aggressive and "rather" impulsive,⁵¹ she testified that she did not believe Student was overly difficult to deal with, as compared to many of the other children in the ED classroom.⁵² The records, however, as reviewed above and below, show that Student was struggling with these behaviors and not being particularly successful in controlling them.

9. At about the same time in October 2006 that Student was not doing well, the record shows that Parents were considering residential treatment at the Villa Santa Maria in New Mexico that had been recommended to them that summer. They were looking for health insurance to cover the costs⁵³ and did not approach Respondent School District requesting placement as part of an IEP. Parents informed Public School Special Education Teacher in October and November 2006 that they were looking into Villa Santa Maria as a placement for Student.⁵⁴ They did not indicate that they were requesting that Respondent School District place Student there.

10. Parents and Student traveled to New Mexico in October to view the facility and have Student evaluated for the program.⁵⁵ Villa Santa Maria is a small residential treatment program (no more than twenty-four residents, typically sixteen) that

⁴⁶ *Id.* [10/10/2006 Incident report].

⁴⁷ *Id.* [10/11/2006 Focused Behavioral Intervention (FBI) Report].

⁴⁸ *Id.* [10/12/2006 Incident report].

⁴⁹ *Id.*

⁵⁰ *Id.* [12/19/06 School Bus Incident Report].

⁵¹ Testimony of Public School Special Education Teacher, R. T. (Vol. III) at 603.

⁵² *Id.*, R. T. (Vol. II) at 539, 542-42, 566.

⁵³ Exhibit 104E, 104F, 104H, 104I; Testimony of Stepmother, R. T. (Vol. II) at 405.

⁵⁴ Exhibit 20.

1 specializes in treating children with RAD. It has a school program within the facility so
2 that it can educate its residents. It is a nonprofit entity⁵⁶ and a private school accredited
3 by the New Mexico Secretary of Education.⁵⁷ The program provides psychiatric care
4 and psychological services, milieu therapy, counseling, and other services. Milieu
5 therapy refers to the continuous interactions with trained staff who help residents
6 regulate their emotions; in short, it is a way to teach the child how to deal with the world
7 and others around her.⁵⁸ The program uses a therapeutic approach known as Dyadic
8 Developmental Psychotherapy (also known as attachment-oriented family therapy),
9 which focuses on relationship and learning to trust and feel secure in relationships.⁵⁹
10 This includes communicating feelings appropriately, regulating emotions, and
11 developing social skills.⁶⁰ It is not a typical behavior modification program like those
12 found in public schools.⁶¹ The campus at Villa Santa Maria is closed and staff is always
13 present with residents, whether they are attending class or not.

14 11. On October 18, 2006, Scott Blackwell, Ph.D., evaluated Student for the
15 program. Dr. Blackwell is a clinical psychologist (licensed in Texas and New Mexico)
16 who has been practicing for more than 20 years.⁶² He has a great deal of experience
17 dealing with children with attachment issues and performs evaluations of potential Villa
18 Santa Maria residents. In his Psychological Evaluation, dated October 25, 2006, he
19 reviewed Student's medical and psychological histories, described his findings based
20 on an interview of Parents, and conducted psychological testing of Student. He found
21 Student to have "chronic emotional overload," "difficulty with social and emotional
22 perception," "rigid impulsivity," "immature social skills," and that Student was "at risk for
23 situational distress such as depression and anxiety and severe conflict with others such
24 as acting out rages."⁶³ Dr. Blackwell recommended that Student be admitted to Villa
25 Santa Maria for residential treatment.

26 ⁵⁵ Exhibit 104A; Testimony of Stepmother, R. T. (Vol. I) at 120.

27 ⁵⁶ Exhibit 3.

28 ⁵⁷ Exhibit 18.

29 ⁵⁸ Testimony of Dr. Blackwell, R. T. (Vol. I) at 37-39.

30 ⁵⁹ *Id.* at 39-40.

⁶⁰ *Id.* at 40.

⁶¹ *Id.*

⁶² Exhibit 63.

⁶³ Exhibit 7.

1 12. Upon returning to Arizona, Student saw Dr. Zwier and Parents gave him
2 information about Villa Santa Maria and told him about Dr. Blackwell's evaluation.⁶⁴ Dr.
3 Zwier noted that he was supportive of the higher level of care for Student at Villa Santa
4 Maria. He noted that she "has not made improvements in extended outpatient
5 treatment despite regular appointments and many different medication trials" and "has
6 required Intensive Special Education Services without any improvements."⁶⁵ The
7 evidence supports those conclusions.

8 13. On November 10, 2006, Dr. Zwier wrote a letter on behalf of Student,
9 recommending residential treatment.⁶⁶ The letter was not addressed to Respondent
10 School District, but "To Whom It May Concern." Dr. Zwier's letter describes Student's
11 diagnoses and her behaviors: "She has had problems with severe impulsivity and
12 aggression, significant non-compliance, periods of extreme sadness and despondency,
13 and general difficulty learning from her behavior, specifically her mistakes."⁶⁷ He
14 recommended residential treatment that would last at least one year and stated that a
15 program like Villa Santa Maria would be "an appropriate medical intervention" for
16 Student.⁶⁸

17 14. Student did not go to Villa Santa Maria immediately. Because Parents were
18 working to get insurance coverage for the placement,⁶⁹ and for other reasons, Student
19 stayed at Pioneer through the Christmas 2006 holiday and into January 2007. She
20 continued to struggle with her behaviors.⁷⁰ On January 11 and 12, 2006, she received

21
22 ⁶⁴ Exhibit 56 [10/26/2006 Progress Note, Dr. Zwier].

23 ⁶⁵ *Id.*

24 ⁶⁶ Exhibit 8.

25 ⁶⁷ *Id.*

26 ⁶⁸ *Id.*

27 ⁶⁹ Exhibit 56 [1/18/2007 Progress Note, Dr. Zwier].

28 ⁷⁰ Respondent School District submitted evidence and made argument about the undisputed fact that
29 Parents took Student off all her behavioral health medications over the 2006 Christmas break and kept
30 her off of them throughout January. This tribunal does not find this fact to be as significant as Respondent
School District and will not join in Respondent School District's criticism of Parents. Medical treatment is a
matter of parental choice. Dr. Zwier, Student's treating psychiatrist at the time, testified that he was
informed of the cessation of Student's medication and that Parents reported that it did not change
Student's behaviors for the worse. Testimony of Dr. Zwier; R. T. (Vol. I) at 164-66. He did not, as
Respondent School District argues at page 7 of PEORIA UNIFIED SCHOOL DISTRICT'S CLOSING ARGUMENT,
admit that Student's behaviors worsened in January 2007. In the end, Respondent School District
admitted that it had to educate Student in whatever condition she presented. *Id.* at 8. Thus, the cessation
of medications is not significant to the outcome of this case.

1 more ISS's and therapeutic holds.⁷¹ On January 11 she refused to go to the timeout
2 room for almost hitting another child with her shoe that she kicked across the room.⁷²
3 When she was finally coaxed to go, she kicked over a chair on her way out.⁷³ In the
4 timeout room she began banging her head and was placed in a hold.⁷⁴ On January 12
5 she went back to ISS in the timeout room and was held three times in one day. First
6 she was held for banging her head and then for standing on top of a desk.⁷⁵ Lastly, she
7 was held late in the school day for kicking furniture, banging her head, and biting
8 herself.⁷⁶ She also, during this time, threatened to run away from home (which she had
9 done before, more than once⁷⁷) if she was put in the timeout room the next day.⁷⁸

10 15. The next few days were a three-day holiday weekend. Student was okay for
11 the next two school days.⁷⁹ Then, on January 18, 2006, Student, who was upset
12 because she did not get to go on a field trip with her class that day due to her
13 behaviors, fought and head-butted the timeout room teacher and later quietly escaped
14 from the timeout room and left the school grounds on foot.⁸⁰ She was missing for about
15 four hours and was found hiding in the play area at a public fast-food restaurant several
16 miles from the school.⁸¹ According to her Stepmother, Student found the incident
17 humorous and not dangerous.⁸²

18 16. Based on the January 18 incident, Respondent School District scheduled an
19 IEP team meeting for January 22, 2007, to discuss changing Student's placement.

20 17. At that point, Parents determined to place Student at Villa Santa Maria.
21 While in October and November Parents had told Public School Special Education
22 Teacher that they were *considering* sending Student to Villa Santa Maria, they had not
23 made any further statements to Respondent School District before January 18.

24 ⁷¹ Exhibits 108I and 108J.

25 ⁷² Exhibits 108I, 108J, and 76 [1/11/2007 Incident report].

26 ⁷³ *Id.*

27 ⁷⁴ *Id.*

28 ⁷⁵ *Id.* [1/12/2007 Incident report].

29 ⁷⁶ *Id.*

30 ⁷⁷ Exhibit 21.

⁷⁸ Exhibits 108I, 108J, and 76 [1/12/2007 Incident report].

⁷⁹ Exhibit 108I.

⁸⁰ Exhibits 108I, 108J, and 76 [1/18/2007 Incident report].

⁸¹ Exhibit 21 [Glendale Police Report].

⁸² Exhibit 56 [1/25/2007 Progress Note, Dr. Zwier].

1 According to Stepmother's testimony, she talked to Pioneer school psychologist Mike
2 Linehan on January 19 and told him that they were sending Student to Villa Santa
3 Maria as soon as she was accepted for admission.⁸³ Stepmother's testimony about the
4 details of the conversation is vague, but she claims that Mr. Linehan responded by
5 telling her that Student's placement in Villa Santa Maria was a medical decision and
6 that Respondent School District was not responsible.⁸⁴ Mike Linehan testified that he
7 did not recall the conversation but that he would never state that Respondent School
8 District would not pay for residential treatment because that was a decision for an IEP
9 team.⁸⁵ In addition, Mary Arden, District Representative for the PUSD Self-Contained
10 Classroom Program for Emotionally Disabled Children, testified that sometime between
11 January 19 and January 22, Stepmother told her that Parents intended to place Student
12 in Villa Santa Maria.⁸⁶ Ms. Arden denied that Stepmother inquired about Respondent
13 School District paying for the residential treatment.⁸⁷ She believed that Parents were
14 seeking coverage for the residential treatment from their health insurance.⁸⁸

15 18. A preponderance of evidence shows that Parents made it clear beginning
16 January 19 that they intended to place Student at Villa Santa Maria as soon as
17 possible. The evidence does not show that Parents requested that Respondent School
18 District bear the cost for the placement at any time before they placed Student there,
19 and even for many months afterward.

20 19. The evidence shows that Parents had received copies of the procedural
21 safeguards numerous times before the January 22, 2007, IEP team meeting.⁸⁹
22 Therefore, Parents were aware of their rights under the IDEA.
23

24 ⁸³ Testimony of Stepmother, R. T. (Vol. I) at 126.

25 ⁸⁴ *Id.* at 127.

26 ⁸⁵ Testimony of Mike Linehan, R. T. (Vol. II) at 433-34.

27 ⁸⁶ Testimony of Mary Arden, R. T. (Vol. III) at 661-62.

28 ⁸⁷ *Id.* at 663.

29 ⁸⁸ *Id.* at 662.

30 ⁸⁹ One or the other of Student's Parents set their initials to statements that they had received a copy of procedural safeguards on or about these dates: 8/28/2003 (Exhibit 12), 11/19/2003 (Exhibit 13), 1/14/2004 (Exhibit 13), 1/7/2005 (Exhibit 14), 2/7/2006 (Exhibit 16), 5/8/2006 (Exhibit 17), 8/25/2006 (Exhibit 19), and 1/22/2007 (Exhibit 22). Additionally, both Stepmother and Father admitted during testimony that they had received the safeguards notice. R. T. (Vol. II) at 303 and 418. For a description of what the procedural safeguards contain, see Conclusion of Law 7 below.

1 20. Parents attended and participated as part of the IEP team that met on
2 January 22, 2007, to discuss changing Student's placement.⁹⁰ The team included
3 Parents, Mary Arden as the special education service provider, a district representative,
4 and Gay Hardy, a certified school psychologist and Director of the ACES.⁹¹ The team
5 unanimously agreed that Student would attend the ACES (Austin Center for
6 Exceptional Students) school, a private day school with a secure, enclosed campus that
7 would be extremely difficult to escape from.⁹² The team focused on security issues for
8 Student in light of the January 18 incident.⁹³ Stepmother testified that she gave the
9 team a copy of Dr. Blackwell's evaluation and Dr. Zwier's letter "To Whom It May
10 Concern."⁹⁴ However, there is no evidence that these documents were discussed at
11 the meeting. After discussion about security and a tour of the ACES, Parents agreed to
12 Student's placement there in a revised IEP.⁹⁵ They did not reject the placement.
13 Stepmother testified that they agreed to the placement only until Student was admitted
14 to Villa Santa Maria, but Father signed the revised IEP without qualification, apparently
15 agreeing to the statement above his signature that "ACES will be the best match for her
16 education at this time."⁹⁶ Placement was the only issue determined at that meeting, as
17 Student's annual IEP renewal was scheduled just a few weeks later.⁹⁷ The team did
18 not consider conducting further evaluation of Student in light of the documents from
19 Drs. Blackwell and Zwier, and Parents did not ask for further evaluation.

20 21. Student attended the ACES school for a few days. It is a private special
21 education day school that specializes in children with behavioral problems, primarily

22 ⁹⁰ Exhibits 22 and 23.

23 ⁹¹ Exhibits 23, 123.

24 ⁹² Exhibit 23.

25 ⁹³ Testimony of Mary Arden, R. T. (Vol. III) at 668-70.

26 ⁹⁴ Testimony of Stepmother, R. T. (Vol. I) at 133. This tribunal finds Stepmother's testimony in this regard
27 to be credible. She specifically recalled handing the documents to a district employee who was at the
28 meeting. Mary Arden, a member of the IEP team, testified that she did not recall Parents presenting any
29 information about Villa Santa Maria at the meeting. R. T. (Vol. III) at 669. However, she was not asked
30 specifically whether she recalled seeing the documents from Drs. Blackwell and Zwier at the meeting.
Furthermore, Gay Hardy, another member of the IEP team, testified that Parents stated at the January 22
meeting that Student would be going to Villa Santa Maria. R. T. (Vol. III) at 711. She too was not asked if
she saw the particular documents at that meeting. Thus, none of the members of the team denied
receiving those documents at the meeting. This tribunal finds that under these circumstances,
Stepmother's testimony that she presented the documents at the meeting is credible.

⁹⁵ Exhibit 23.

⁹⁶ *Id.*

those with an emotional disability.⁹⁸ The campus is secure; it is fenced and has video surveillance.⁹⁹ Also, children are not left alone while on campus.¹⁰⁰ The school has therapists and counselors on staff to work with students.¹⁰¹ A timeout system is used for behavioral problems, in which a student is first sent to brief timeout in the classroom, then outside the classroom if the student is not calming herself, and then to a separate timeout room, all the while accompanied and counseled by staff who are trained as "behavior coaches" and trained in "nonviolent crisis prevention intervention."¹⁰² They may also perform therapeutic holds for the safety of the student.¹⁰³ Essentially, then, the ACES school was to provide similar behavioral supports as Pioneer, but with added security.

22. Student's behavioral struggles continued for the few days she attended the ACES school. On January 29, 2007, Student punched another student while playing football at lunch recess.¹⁰⁴ The next day, January 30, Student was told not to play football during recess.¹⁰⁵ Student refused to follow the order and tried to "get away" from staff.¹⁰⁶ She was eventually escorted to the timeout room for the remainder of lunch recess.¹⁰⁷

23. On January 31, 2007, Parents took Student to new Mexico and she was admitted to Villa Santa Maria. Parents notified Private Day School Teacher that they had placed Student at Villa Santa Maria.¹⁰⁸ She has been there since.

24. Parents' actions on January 31, 2007, and subsequent notification to the ACES school constituted a unilateral withdrawal of Student from Respondent School District and an enrollment in a private school.¹⁰⁹

⁹⁷ Exhibit 27.

⁹⁸ Testimony of Gay Hardy, R. T. (Vol. III) at 696-97.

⁹⁹ *Id.* at 699.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 700.

¹⁰² *Id.* at 702-03.

¹⁰³ *Id.* at 703-04.

¹⁰⁴ Exhibit 128.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* See also Exhibit 67.

¹⁰⁸ Exhibit 129.

¹⁰⁹ This means ipso facto that Student was no longer enrolled in a school in the Respondent School District.

1 25. Private Day School Special Education Teacher testified that Student was in
2 her class for only a very short time, four or five days, before she was removed to Villa
3 Santa Maria.¹¹⁰ She described the behavioral support system used at ACES as a
4 reward system with children getting higher or lower on a continuum depending on how
5 they are behaving.¹¹¹ She also described the timeout steps, first trying it in the
6 classroom and then, if not successful, going to a separate timeout room that is
7 monitored by a teacher in the room.¹¹² This is similar to the program at Pioneer.
8 Because she did not spend much time with Student before Student withdrew to New
9 Mexico, Private Day School Special Education Teacher's observations about Student
10 are given little weight.

11 26. On February 13, 2007, a meeting was held to create an IEP for Student, to
12 be effective should she return to Respondent School District for school.¹¹³ At that point
13 in time, it was not clear how long Student would be in the residential treatment center.
14 The IEP team did not make any substantial changes to the January 22, 2007, amended
15 IEP, and again placed Student at the ACES school.¹¹⁴ Again, Parents signed the IEP in
16 agreement. They did not reject the placement and request that Respondent School
17 District place Student in or pay for Villa Santa Maria.

18 27. In November 2007, Respondent School District, at Parents request,
19 evaluated Student for the primary purpose of determining her proper eligibility category.
20 Michael Linehan, a school psychologist for Respondent School District, traveled to Villa
21 Santa Maria and observed Student for the evaluation.¹¹⁵ He also interviewed Student's
22 doctors and counselors, and her teacher and therapist. He concluded that she met the
23 eligibility criteria for Emotional Disability because "her emotional problems appear to be
24 more significant than generally indicated by any other classification than Emotional
25 Disability." He also found that Student was performing well in school, but continued to
26 have significant behavioral concerns, including a significant flight risk, poor impulse
27 control, lack of ability to self-regulate, physical aggression with staff, lying and stealing,

28 ¹¹⁰ R. T. (Vol. III) at 749.

29 ¹¹¹ *Id.* at 746.

30 ¹¹² *Id.* at 747.

¹¹³ Exhibit 27.

¹¹⁴ *Id.*

1 poor personal hygiene, and inability to build and maintain relationships with peers and
2 staff. He concluded that Student needed "extensive special education assistance" and
3 "a highly structured and nurturing classroom providing an individualized curriculum and
4 social skills training."¹¹⁶

5 28. At hearing, Parents called to the stand several medical professionals who
6 have treated or evaluated Student during the past two years. These witnesses included
7 Dr. Gabrielle Lawrence, a clinical psychologist who performed a limited, non-formal
8 evaluation of Student in June 2006 and first suggested Villa Santa Maria as an
9 option.¹¹⁷ They also included Student's current treating psychiatrist, Dr. Judith Pentz,
10 who has treated Student at Villa Santa Maria since May 2007.¹¹⁸ She testified that she
11 sees Student individually an average of twice a month and observes her weekly in the
12 milieu.¹¹⁹ She testified that Student has been quite difficult to manage.¹²⁰ She also
13 confirmed that Student's behavioral problems are severe risk of flight, impulsivity,
14 opposition, and emotional instability.¹²¹ It is her opinion that Student requires ongoing
15 therapy and mental health services in a residential setting to be educated.¹²²

16 29. Two other medical witnesses called by Parents gave much stronger
17 testimony because they both have substantial knowledge of Student's condition before
18 January 22, 2007. Dr. Scott Blackwell testified about his evaluation of Student in
19 October 2006, as described in Finding of Fact 11 above, and affirmed his conclusion
20 that Student requires residential treatment. He testified that if Student were not in a
21 residential setting, she would be at a high risk for flight and other behaviors because of
22 her severe impulsivity.¹²³ He also testified that in the residential setting there is less
23

24 ¹¹⁵ Parents' spoliation argument with regard to Mr. Linehan's report is without merit.

25 ¹¹⁶ Because Mr. Linehan's evaluation occurred 10 months after the focal point in time in this case, late
26 January 2007, it is of limited value in determining whether or not the January 22, 2007, IEP provided a
27 FAPE. See *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (whether a program offered a
28 FAPE is determined by looking at the information available at the time it was drafted, not in hindsight).

29 ¹¹⁷ Because Dr. Lawrence did not perform a formal evaluation, her opinion is given limited weight.

30 ¹¹⁸ Testimony of Dr. Pentz, R. T. (Vol. I) at 264.

¹¹⁹ *Id.* at 273.

¹²⁰ *Id.* at 265.

¹²¹ *Id.* at 268-71.

¹²² *Id.* at 269. As with Mr. Linehan's evaluation, this testimony is of limited value because it is based on
information about Student *after* January 22, 2007.

¹²³ R. T. (Vol. I) at 44-45.

1 emotional disregulation.¹²⁴ He concluded that Student needs residential schooling with
2 highly trained staff because of her emotional disabilities.¹²⁵ He estimated that she will
3 need to be at Villa Santa Maria for eighteen months of treatment.¹²⁶

4 30. Dr. Kenneth Zwier, Student's treating psychiatrist for several years before
5 January 2007, also testified at the hearing in support of his recommendation, made as
6 early as October 2006,¹²⁷ that Student receive residential treatment. Dr. Zwier is a
7 Board-certified child and adolescent psychiatrist who has been practicing for twelve
8 years.¹²⁸ He testified that Student was very difficult to treat.¹²⁹ He testified that when
9 the idea of residential treatment first arose, he was hesitant and wanted to take time to
10 consider it; he was reluctant to recommend that Student be sent away from her
11 home.¹³⁰ Eventually, he concluded that Student's flight from the school on January 18,
12 2007, gave him great concern about her safety and ability "to be regulated or to be
13 maintained" outside of residential treatment.¹³¹ And, therefore, he affirmed at the
14 hearing his recommendation, made before the January 22, 2007, IEP, that Student be
15 in residential treatment.¹³² He emphasized that Student needed a program with highly
16 trained professionals to deal with her behavioral problems.¹³³

17 31. The opinions of Drs. Blackwell and Zwier are given great weight because of
18 their expertise and knowledge of Student prior to January 22, 2007. Respondent did
19 not call any medical expert witness to contradict their testimony.

20 32. Both Parents and Respondent School District called educational
21 professionals as witnesses at the hearing. Parents called RTC Special Education
22 Teacher. Her testimony is of limited value, because she has no direct knowledge of
23 Student's behaviors while Student was at Pioneer, but she testified about Student's
24 behaviors while in class at Villa Santa Maria. As she described it, Student's behavior
25 and performance fluctuates dramatically depending on how Student is doing

26 ¹²⁴ *Id.* at 45.

27 ¹²⁵ *Id.* at 53.

28 ¹²⁶ *Id.* at 66.

29 ¹²⁷ Exhibit 56 [10/26/2006 Progress Note, Dr. Zwier].

30 ¹²⁸ R. T. (Vol. I) at 135-36.

¹²⁹ *Id.* at 137.

¹³⁰ *Id.* at 140-41.

¹³¹ *Id.* at 144.

¹³² *Id.* at 145.

emotionally.¹³⁴ She stated that it would be very difficult to maintain Student in a public school setting.¹³⁵

33. Respondent School District called as a witness Public School Special Education Teacher, who was Student's teacher from August 2006 until January 18, 2007, and Private Day School Special Education Teacher, who was Student's teacher at the ACES for three days in late January 2007. Respondent School District also called Gay Hardy, a school psychologist and Director of the ACES. Both Private Day School Special Education Teacher and Ms. Hardy had very limited knowledge of Student and her behaviors at Pioneer, which limits the weight of their testimony. However, this is not true of Public School Special Education Teacher. As Student's special education teacher for approximately five months, she had substantial knowledge of Student's behaviors. She described the behavioral program that she employed, based on a point system, to help her students regulate their behaviors.¹³⁶ She testified that Student had good and bad days, and that she did not find Student a particularly difficult student to work with.¹³⁷ In her opinion, Student was not "extremely aggressive" in the classroom.¹³⁸ Furthermore, she did not believe that Student's behaviors required a more restrictive placement.¹³⁹ She acknowledged that Student had to be physically restrained on occasion,¹⁴⁰ but felt that Student was making progress.¹⁴¹

34. Other witnesses called by both parties had direct knowledge of Student after January 2007, making their testimony less valuable to the focal point of this case.

35. The evidence shows that Villa Santa Maria is an appropriate placement for Student. It specializes in treating and educating children with the type of emotional problems that Student has been diagnosed with.

¹³³ *Id.* at 147.

¹³⁴ R. T. (Vol. II) at 357.

¹³⁵ *Id.* at 359.

¹³⁶ R. T. (Vol. II) at 535-37.

¹³⁷ *Id.* at 538-39.

¹³⁸ *Id.* at 542-43.

¹³⁹ *Id.* at 547.

¹⁴⁰ *Id.* at 558.

¹⁴¹ *Id.* at 556.

36. The evidence as to Parents' costs for the Villa Santa Maria placement is sketchy. No invoices or bills were presented, nor were receipts. Instead, the record contains an agreement between Parents and Villa Santa Maria establishing a tuition fee of \$300 per day,¹⁴² and a fee schedule that is not specific to Parents and contradicts the tuition fee established by their agreement.¹⁴³ As such, the only reliable evidence is the tuition agreement for \$300 per day. The record does not contain any statement or other evidence showing for how many days Student must pay tuition.

CONCLUSIONS OF LAW

1. This case presents the issues of whether or not Respondent School District offered Student a free appropriate public education and, if not, whether Parents' expenses for unilaterally placing Student at a residential treatment center are reimbursable in whole or in part. Petitioners have also presented the question of whether the residential treatment center is the only appropriate placement for Student to receive a FAPE under the IDEA.¹⁴⁴ The applicable law in these areas is as follows.

APPLICABLE LAW

2. Through the IDEA, Congress has sought to ensure that all children with disabilities are offered a free appropriate public education that meets their individual needs.¹⁴⁵ These needs include academic, social, health, emotional, communicative, physical, and vocational needs.¹⁴⁶ The stated purposes of the IDEA include "to ensure that all children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs and prepare them for further educational, employment, and independent living," and "to ensure that the rights of children with disabilities and parents of such children are protected."¹⁴⁷

3. To meet the needs of disabled children, school districts must identify and evaluate all children within their geographical boundaries who may be in need of special education and services. The IDEA sets forth requirements for the identification,

¹⁴² Exhibit 104C.

¹⁴³ Exhibit 4.

¹⁴⁴ See the statement of issues above at page 2-3.

¹⁴⁵ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

¹⁴⁶ *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106).

¹⁴⁷ 20 U.S.C. § 1400(d)(1)(A) and (B).

1 assessment and placement of students who need special education, and seeks to
2 ensure that they receive a free appropriate public education. A free appropriate public
3 education (FAPE) consists of "personalized instruction with sufficient support services
4 to permit the child to benefit educationally from that instruction."¹⁴⁸ The IDEA mandates
5 that school districts provide a "basic floor of opportunity," nothing more.¹⁴⁹ It does not
6 require that each child's potential be maximized.¹⁵⁰

7 4. A school district meets its obligations under the IDEA if it complies with IDEA
8 procedures and develops, through those procedures, an individualized educational
9 program (IEP) that is "reasonably calculated to enable the child to receive educational
10 benefits."¹⁵¹

11 The Meaning of FAPE

12 5. The principal benefit to a disabled child under the IDEA is a free appropriate
13 public education.¹⁵² A child receives a FAPE if a program of instruction "(1) addresses
14 his unique needs, (2) provides adequate support services so he can take advantage of
15 the educational opportunities and (3) is in accord with an individualized educational
16 program."¹⁵³

17 Parental Participation

18 6. Once a child is determined eligible for special education services, a team
19 composed of the child's parents, teachers, and others formulate an IEP that, generally,
20 sets forth the child's current levels of educational performance and sets annual goals

21 ¹⁴⁸ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982) ("*Rowley*").

22 ¹⁴⁹ *Id.*, 458 U.S. at 200.

23 ¹⁵⁰ *Id.* at 198.

24 ¹⁵¹ *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001) (quoting
25 *Rowley*, 458 U. S. at 207).

26 ¹⁵² FAPE is defined in the IDEA as follows:

27 Free appropriate public education. The term "free appropriate public
28 education" means special education and related services that--

29 (A) have been provided at public expense, under public supervision
30 and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or
secondary school education in the State involved; and

(D) are provided in conformity with the individualized education
program required under section 614(d) [20 USCS § 1414(d)].

20 U.S.C. § 1401(9). See also 34 C.F.R. § 300.17 (parallel definition).

1 that the IEP team believes will enable the child to make progress in the general
2 education curriculum.¹⁵⁴ The IEP tells how the child will be educated, especially with
3 regard to the child's needs that result from the child's disability, and what services will
4 be provided to aid the child. The child's parents have a right to participate in the
5 formulation of an IEP. To foster full parent participation, in addition to being a required
6 member of the team making educational decisions about the child, school districts are
7 required to give parents written notice when proposing any changes to the IEP,¹⁵⁵ and
8 are required to give parents, at least once a year, a copy of the parents' "procedural
9 safeguards," informing them of their rights as parents of a child with a disability.¹⁵⁶

10 7. The procedural safeguards must contain a full, easily understandable
11 explanation of parental rights for their child in special education.¹⁵⁷ These rights include
12 an independent educational evaluation, written notice of proposed changes, parental
13 consent, the opportunity to present and resolve complaints, the child's placement
14 during pendency of due process proceedings ("stay put"), due process hearing and
15 appeal, and provisions relating to school disciplinary actions against children in special
16 education.¹⁵⁸ Specifically required as a necessary part of the notice is an explanation
17 of provisions related to reimbursement for the unilateral placement of children by
18 parents in private schools.¹⁵⁹

19 Least Restrictive Environment

20 8. Children with disabilities are entitled to be educated with non-disabled
21 children "to the maximum extent appropriate."¹⁶⁰ This means that children receiving
22 special education services should not be removed from the regular education setting
23 unless the child cannot be educated in that setting. However, when necessary to
24

25 ¹⁵³ *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006) (citing *Capistrano Unified*
Sch. Dist. v. Wartenberg, 59 F.3d 884, 893 (9th Cir. 1995).

26 ¹⁵⁴ 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

27 ¹⁵⁵ 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

28 ¹⁵⁶ 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet.
29 ¹⁵⁷ 20 U.S.C. § 1415(d)(B). Dawn Ratke, Special Education Director, testified that that they are posted on
Respondent School District's website. R.T. (Vol. III) at 773.

30 ¹⁵⁸ 34 C.F.R. § 300.504(c).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at (c)(9).

¹⁶⁰ 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2).

1 provide a FAPE and as determined by the IEP team, placement in a residential
2 program at the expense of the school district is mandated under the IDEA.¹⁶¹

3 Reimbursement for Private School Placement

4 9. Parents who dispute whether an IEP provides a FAPE to a child, and who as
5 a result enroll that child in a private school, may receive reimbursement for the costs of
6 that private-school enrollment under certain circumstances.¹⁶² First, the child must
7 have been receiving special education and related services from the school district prior
8 to the dispute.¹⁶³ In addition, the program offered by the school district must fail to
9 provide a FAPE to the child and the private school must be an "appropriate"
10 placement.¹⁶⁴ A private school placement may be appropriate even if it does not
11 operate under public school standards.¹⁶⁵ Under these circumstances, parents may
12 "enroll the child in a private preschool, elementary school,¹⁶⁶ or secondary school
13 without the consent of or referral by the [school district]. . ." and seek reimbursement
14 from the school district for the expense of that enrollment from a court or hearing
15 officer.¹⁶⁷ Indeed, parents have "an equitable right to reimbursement for the cost of
16 providing an appropriate [private] education when a school district has failed to offer a
17 child a [free appropriate public education]."¹⁶⁸ Furthermore, the placement does not
18 have to meet IDEA requirements for FAPE.¹⁶⁹

19 10. However, an award for reimbursement can be reduced or denied in various
20 circumstances.¹⁷⁰ An award may be reduced or denied if the parents have not given
21 adequate notice as set forth in the IDEA,¹⁷¹ have not allowed the school district to
22 evaluate the child upon the school district's request prior to the removal of the child

23 ¹⁶¹ 34 C.F.R. § 300.104.

24 ¹⁶² 34 C.F.R. § 300.148.

25 ¹⁶³ 34 C.F.R. § 300.148(c).

26 ¹⁶⁴ *Id.*

27 ¹⁶⁵ *Id.*

28 ¹⁶⁶ The IDEA defines "elementary school" as "a nonprofit institutional day or residential school, including a
29 public elementary charter school, that provides elementary education, as determined under State law."
30 20 U.S.C. § 1401(6); 34 C.F.R. § 300.13. Villa Santa Maria fits this definition. See Finding of Fact 10.

¹⁶⁷ 34 C.F.R. § 300.148(b) and (c).

¹⁶⁸ *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) (quoting *W.G. v. Bd. of Trustees*, 960
F.2d 1479, 1485 (9th Cir. 1992)).

¹⁶⁹ *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).

¹⁷⁰ 34 C.F.R. § 300.148(d).

¹⁷¹ 34 C.F.R. § 300.148(d)(1).

from the public school,¹⁷² or have acted otherwise unreasonably.¹⁷³ Adequate notice is provided by either (1) written notice to the school district at least ten days before removal¹⁷⁴ or (2) by the parents' verbal statement, at the most recent IEP team meeting before the removal, that they (a) reject the placement proposed in the IEP and (b) intend to enroll the child in a private school at public expense.¹⁷⁵ However, reimbursement must not be reduced or denied if the school district prevented the parents from giving notice, if the school district did not give the parents the procedural safeguards notice, or if giving notice would likely result in physical harm to the child.¹⁷⁶ Furthermore, a reimbursement award might not be reduced if the reason the parents failed to give notice is because they are not literate or do not speak English, or because giving notice would likely result in serious emotional harm to the child.¹⁷⁷

DECISION

11. A parent who files for a due process hearing alleging non-compliance with the IDEA must bear the burden of proving that claim.¹⁷⁸ The standard of proof is "preponderance of the evidence," meaning evidence showing that a particular fact is "more probable than not."¹⁷⁹ Therefore, in this matter, in order to prevail on the claim for reimbursement, Petitioners bear the burden of proving by a preponderance of evidence that (1) Respondent School District failed to offer FAPE in the January 22, 2007, IEP, (2) that Villa Santa Maria is an appropriate placement, and (3) that Parents gave adequate notice of their rejection of the placement proposed by Respondent School District. Petitioners have met their burden with regard to these first two issues, but not as to the third.

12. The focal point of Parents' claim, and the threshold issue, is whether the January 22, 2007, IEP was appropriately designed so as to convey Student meaningful

¹⁷² 34 C.F.R. § 300.148(d)(2).

¹⁷³ 34 C.F.R. § 300.148(d)(3).

¹⁷⁴ 34 C.F.R. § 300.148(d)(1)(ii).

¹⁷⁵ 34 C.F.R. § 300.148(d)(1)(i).

¹⁷⁶ 34 C.F.R. § 300.148(e)(1).

¹⁷⁷ 34 C.F.R. § 300.148(e)(2).

¹⁷⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

¹⁷⁹ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279 (1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431, 437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

1 educational benefit. The IEP should not be judged in hindsight, but as to what was
2 known or should have been known at the time the IEP was written and whether it was
3 reasonably calculated to confer meaningful educational benefit.¹⁸⁰

4 13. The evidence here contains the uncontradicted medical opinions of doctors,
5 who had evaluated and worked with Student for a substantial amount of time before
6 January 2007 and knew her, and who determined that Student could not be maintained
7 emotionally and psychologically outside of a residential treatment center. Thus, the
8 only way to provide education to her was in a residential treatment setting. As noted
9 above, these were the opinions of both Dr. Zwier and Dr. Blackwell, whose testimony
10 on this subject is given great weight because of their expertise and knowledge of
11 Student. Other witnesses, whose testimony is of less weight, agreed with that
12 conclusion.

13 14. On the other hand, Public School Special Education Teacher, who also had
14 substantial knowledge of Student before January 2007, testified that in her judgment
15 Student could be educated in the community, albeit with a great deal of behavioral
16 supports and added security. Again, other witnesses agreed.

17 15. Furthermore, the record shows that Parents attempted to make the IEP
18 team aware of the medical opinions of Dr. Blackwell and Dr. Zwier at the January 22,
19 2007, IEP meeting.¹⁸¹ Indeed, an IEP team has an obligation to review any relevant
20 information provided by a parent.¹⁸² Yet the record does not show that the January 22,
21 2007, IEP team considered the medical information provided by Parents.

22 16. Considering this evidence as a whole, this tribunal must give due weight to
23 the medical experts who were in unison and not contradicted in their medical opinions
24 that Student could not have been taught outside of residential treatment in late January
25 2007. Against this is the firm conviction of Public School Special Education Teacher
26 that Student did not need a more restrictive setting. However, although a close call, this
27 tribunal concludes, after careful and prolonged deliberation, that the opinions of Drs.

28
29 ¹⁸⁰ *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999).

30 ¹⁸¹ Finding of Fact 20.

¹⁸² When an IEP is revised, the team must address any information about the child's needs that is provided by parents. 34 C.F.R. § 300.324.

1 Blackwell and Zwier prevail, and are supported by the evidence of Student's behaviors
2 leading up to the January 22, 2007, IEP team meeting.

3 17. Without more severe medical intervention such as provided in residential
4 treatment, Student was not likely to receive educational benefit at the time that the
5 January 22, 2007, IEP was drafted. Therefore, the IEP did not offer Student a FAPE.

6 18. In addition, the evidence shows that Villa Santa Maria was an appropriate
7 placement.¹⁸³

8 19. Thus, Parents have met the threshold issues for their reimbursement claim.

9 20. Because Parents have shown that Respondent School District failed to offer
10 Student a FAPE in January 2007 and that Villa Santa Maria was an appropriate
11 placement, reimbursement in whole or in part may be appropriate, depending upon
12 whether adequate notice was given.¹⁸⁴ Based upon the adequacy of the notice Parents
13 gave Respondent School District, this tribunal may reduce or deny the reimbursement
14 claim.

15 21. Under the regulations governing reimbursement claims, Parents are
16 required to give either written notice ten days in advance of the withdrawal or verbal
17 notice at the most recent IEP team meeting prior to the removal of the child.¹⁸⁵ Under
18 either method, the notice required must make clear that Parents are (1) rejecting the
19 proposed placement and (2) intend to enroll the child in the private placement at public
20 expense. The evidence is clear that Parents did not give adequate notice.

21 22. While Parents declared that they intended to place Student at Villa Santa
22 Maria, they did not reject the IEP placement and did not make clear that they were
23 seeking payment for the placement from Respondent School District. First, they
24 approved the placement at the ACES by signing the IEP without objection. The
25 evidence does not show that Parents conveyed to the team that they were rejecting
26 placement at the ACES. Second, Parents gave every impression that they were

27
28 ¹⁸³ See Finding of Fact 35. It should be noted that Respondent School District, in its closing argument,
29 failed to argue that Villa Santa Maria was not an appropriate placement.

30 ¹⁸⁴ Respondent School District does not contend that either of the two other conditions that could limit a
reimbursement claim, failure of the parent to allow evaluation of the child or a judicial finding that parental
action was unreasonable, are relevant here.

¹⁸⁵ See Conclusion of Law 10.

1 seeking payment for the placement through insurance, not from Respondent School
2 District.

3 23. Parents claim that they did not know their rights in this regard. However, the
4 record is clear that Parents received the procedural safeguards notice numerous
5 times.¹⁸⁶ That notice contains information about parents' rights when they remove a
6 child from public school without consent of the school district and in response to an IEP
7 dispute.¹⁸⁷ Therefore, Parents knew their rights and failed to exercise them
8 appropriately, leaving Respondent School District without adequate notice.

9 24. In addition, the record does not show an emergency circumstance or
10 potential harm to the child that would have excused Parents from giving the proper
11 notice on January 22, 2007.¹⁸⁸ Neither does it show that Respondent School District
12 prevented Parents from giving notice. Thus, Parents were not excused from the notice
13 requirement.

14 25. In summary, this tribunal concludes that Parents did not give adequate
15 notice at the time the IEP was created of their rejection of the IEP placement and their
16 intent to seek residential placement at public expense, but attempted to give some
17 information to Respondent School District about Villa Santa Maria and the medical
18 recommendations that Student be placed there. As a result, this means that Parents'
19 reimbursement claim may be reduced or denied. This tribunal exercises its discretion
20 to find that Parents' claim be reduced by half. This reduction is based on the
21 conclusion that, although Parents did not give adequate notice, Respondent School
22 District should have considered the letter from Dr. Zwier and the evaluation findings of
23 Dr. Blackwell at the January 22, 2007, IEP meeting. Both parties could have done
24 more to address and clarify any disagreement at that time.

25 26. In this matter, Parents have not presented sufficient evidence of the total
26 costs for Villa Santa Maria. They have only established the cost of tuition for Student on
27 a daily basis.¹⁸⁹ Therefore, Parents' reimbursement claim is limited to tuition only and
28 the fifty percent reduction applies to Student's tuition.

29 ¹⁸⁶ Finding of Fact 19.

¹⁸⁷ See Conclusion of Law 7.

¹⁸⁸ See Conclusion of Law 10.

¹⁸⁹ Finding of Fact 36.

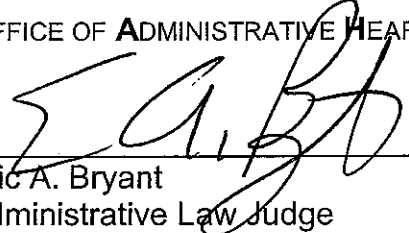
1 27. As to the second issue presented by the petition in this due process action,
2 this tribunal declines to determine whether placement at the residential treatment center
3 is the only appropriate placement for Student to receive FAPE at this time. Student is
4 no longer enrolled with Respondent School District. Such an inquiry is more properly
5 placed in the hands of Student's IEP team at the time that she is to be discharged from
6 Villa Santa Maria and intends to re-enroll with Respondent School District.

7 **ORDER**

8 Based on the findings and conclusions above, IT IS HEREBY ORDERED that
9 the relief requested in the due process complaint is **granted in part**. Respondent
10 School District and Parents shall share the tuition cost for Student's private residential
11 placement, up to 18 months, on a 50/50 basis, each party bearing 50% of that tuition
12 cost.

13 Done this 2nd day of May 2008.

14 OFFICE OF ADMINISTRATIVE HEARINGS

15 
16 _____
17 Eric A. Bryant
18 Administrative Law Judge
19

20 **RIGHT TO SEEK JUDICIAL REVIEW**

21 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this
22 Decision and Order is the final decision at the administrative level.
23 Furthermore, any party aggrieved by the findings and decisions made
24 herein has the right to bring a civil action, with respect to the complaint
25 presented, in any State court of competent jurisdiction or in a district court
26 of the United States. Any action for judicial review must be filed within 90
27 days of the date of the Decision or, if the State has an explicit time
28 limitation for bringing this type of action, in such time as the State law
29 allows.
30

1 Copy sent by **electronic mail** this 2 day of May 2008,
2 and mailed by certified mail (No. 7001 0360 0002 8217 1686
3 this 5 day of May 2008, to:

4 David L. Abney, Attorney
5 Law Offices of Charles M. Brewer LTD
6 5500 N. 24th St.
7 Phoenix, AZ 85016
8 Attorneys for Petitioners
9 **abneymaturin@aol.com**

9 Copy sent by **electronic mail** this 2 day of May 2008.
10 and mailed by certified mail (No. 7001 0360 0002 8217 1693
11 this 5 day of May 2008, to:

12 Lindsay E. Jones
13 GUST ROSENFELD, PLC
14 201 E. Washington, Suite 800
15 Phoenix, AZ 85004-2327
16 Attorneys for Respondent School District
17 **ljones@gustlaw.com**

16 Copy mailed by interdepartmental mail this 5 day of May 2008, to:

18 Colette Chapman, Exceptional Student Services
19 Arizona Department of Education
20 ATTN: Kacey Gregson
21 1535 West Jefferson
22 Phoenix, AZ 85007

22 By 